

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Nekoosa Papers, Inc. : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Corporation :
Franchise Tax under Article 9A of the Tax Law for :
the Years 1975 & 1976. :

State of New York }
ss.:
County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 14th day of March, 1984, he served the within notice of Decision by certified mail upon Nekoosa Papers, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Nekoosa Papers, Inc.
c/o James J. Peissig
100 Wisconsin River Dr.
Port Edwards, WI 54469

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
14th day of March, 1984.

David Parchuck

James J. Peissig
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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of :
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for Redetermination of a Deficiency or Revision :
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Franchise Tax under Article 9A of the Tax Law for :
the Years 1975 & 1976. :

State of New York }
ss.:
County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 14th day of March, 1984, he served the within notice of Decision by certified mail upon E. Parker Brown, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

E. Parker Brown
Hancock & Estabrook
1 Mony Plaza
Syracuse, NY 132022791

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
14th day of March, 1984.

David Parchuck

James A. [Signature]
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Nekoosa Papers, Inc. : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Corporation :
Franchise Tax under Article 9A of the Tax Law for :
the Years 1975 & 1976. :

State of New York }
County of Albany } ss.:

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 14th day of March, 1984, he served the within notice of Decision by certified mail upon Philip Cannella, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Philip Cannella
Director of Taxes
75 Prospect St.
Stamford, CT 06901

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
14th day of March, 1984.

David Parchuck

James A. Haskins
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

March 14, 1984

Nekoosa Papers, Inc.
c/o James J. Peissig
100 Wisconsin River Dr.
Port Edwards, WI 54469

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
E. Parker Brown
Hancock & Estabrook
1 Mony Plaza
Syracuse, NY 132022791
AND
Philip Cannella
Director of Taxes
75 Prospect St.
Stamford, CT 06901

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
NEKOOSA PAPERS, INC.	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Corporation Franchise Tax under	:	
Article 9-A of the Tax Law for the Years 1975	:	
and 1976.	:	

Petitioner, Nekoosa Papers, Inc., c/o James J. Peissig, 100 Wisconsin River Drive, Port Edwards, Wisconsin, 54469, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the years 1975 and 1976 (File No. 28818).

A formal hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on February 8, 1983 at 2:45 P.M., with all briefs to be submitted by August 27, 1983. Petitioner appeared at the hearing by its Director of Taxes, Philip Cannella, and on its brief by Hancock, Estabrook, Ryan, Shove & Hust, Esqs. (Joseph H. Murphy and E. Parker Brown, II, Esqs., of counsel). The Audit Division appeared at the hearing by Paul B. Coburn, Esq. (Anne W. Murphy, Esq., of counsel), and on its brief by John P. Dugan, Esq. (Anna Colello, Esq., of counsel).

ISSUES

I. Whether petitioner was doing business and/or employing capital in New York State during the years at issue, thus having a nexus to New York sufficient to subject it to the imposition of corporation franchise tax under section 209.1 of the Tax Law.

II. Whether, if petitioner was subject to corporation franchise tax as above, the Audit Division properly required recalculation of the receipts factor of petitioner's business allocation percentage on a "destination" rather than an "origin" basis.

FINDINGS OF FACT

1. On January 10, 1980, following a field audit, the Audit Division issued to petitioner, Nekoosa Papers, Inc., a separate Notice of Deficiency for each of the years 1975 and 1976, asserting additional tax due in the respective amounts of \$36,359.68 for 1975 and \$52,086.10 for 1976, plus interest for each year.

2. Petitioner, Nekoosa Papers, Inc., is a corporation organized under the laws of the State of Wisconsin. During the early 1970's, petitioner had mills located at Nekoosa, Port Edwards and Whiting, Wisconsin; Ashdown, Arkansas; and Potsdam, New York. It had sales offices located in Atlanta, Georgia; Dallas, Texas; Bloomington, Minnesota; Burlingame, California; Chicago, Illinois; and Stamford, Connecticut. Petitioner manufactures and sells various paper products, including business communication papers for copiers and computers, carbonless business forms, check and uncoated printing papers.

3. The Potsdam, New York, mill was purchased by petitioner in 1957 for the production of business communications paper. The mill was not equipped to manufacture its own pulp and, consequently, had to purchase this raw material primarily from outside sources. In the early 1970's this practice became uneconomic, and petitioner decided to close the Potsdam facility.

4. The phase-out of production and operations at the Potsdam mill began in 1973 and was completed by December 21, 1974. This included shutting down the mill's two papermaking machines and the discharge of its production employees.

5. In 1974 the Potsdam mill's net sales averaged \$1,254,051.00 per month from January through September. The October, November, and December, 1974, net sales figures dropped to \$787,694, \$882,506, and \$521,327, respectively.

6. Net sales in 1975 totalling \$66,558.00 in January and \$2,769.00 in March, were the result of the liquidation of existing assets. There were no net sales in 1976.

7. The inventory at the Potsdam mill, as recorded in petitioner's general ledger, was as follows:

	<u>12-31-74</u>	<u>12-31-75</u>	<u>12-31-76</u>
Finished Paper	\$ 86,576	\$ -0-	\$ -0-
In-Process Paper	121,845	-0-	-0-
Spare Parts & Stock	581,828	11,077	11,077
Felts & Wires	90,303	90,303	90,303
Returnable Containers	882	-0-	-0-
LIFO Reserve	<u>(140,790)</u>	<u>-0-</u>	<u>-0-</u>
TOTAL	<u>\$740,644</u>	<u>\$101,380</u>	<u>\$101,380</u>

8. The finished paper recorded in inventory at the close of 1974 consisted of poor quality items which were sold in early 1975. Some of the in-process paper recorded in inventory at the close of 1974 was sold for approximately \$16,000 in early 1975; the remainder was scrapped.

9. The category labeled "spare parts and stock" consisted of spare parts for mill machinery, as well as chemicals, fuel, pallets, and wrapping paper. During 1975, disposition was made of the \$581,828 in inventory in this category as follows: \$490,527 was transferred to petitioner's facilities in Wisconsin, \$80,224 was scrapped and \$11,077 in fuel oil was assigned to remain at the Potsdam mill for sale with the facility.

10. Felts and wires were integral parts of the Potsdam mill's papermaking machines, and remained for sale with the facility. The "returnable containers" category consisted of miscellaneous, expendable containers which appear to have

been scrapped. The LIFO reserve entry was for bookkeeping purposes only and did not represent any actual materials.

11. During the years 1975 and 1976, the non-producing Potsdam mill was petitioner's only facility in New York State.

12. After the shutdown of the Potsdam mill in 1974, petitioner made a strenuous effort to locate a purchaser for the facility. Negotiations were entered into with Potsdam Paper Company in June, 1976, which led to Potsdam Paper Company's purchase of the facility in August, 1977.

13. Petitioner filed New York State Corporation Franchise Tax Reports (Forms CT-3) for 1975 and 1976. The receipts factor of petitioner's business allocation percentage for both years was calculated according to the "origin" method, whereby receipts were allocated to New York State on all sales of items produced at the Potsdam facility. Petitioner had consistently calculated the receipts factor in this manner for 20 years, and this method had been routinely accepted by the Audit Division.

14. Petitioner asserts it was unaware of a 1968 change in the Tax Law regarding the receipts factor of the allocation percentage, whereby calculation of the receipts factor was changed from origin basis to destination basis.

15. Upon audit of the years 1975 and 1976, petitioner's receipts factor calculation was converted by the Audit Division to the "destination" method (ostensibly due to the above-noted law change), whereby petitioner's receipts from the sale of property were allocated to New York State when shipments of such property were made to points within New York State. Petitioner asserts this had the effect of causing double taxation because petitioner had already reported receipts from property shipped from its Wisconsin and Arkansas facilities on returns filed with those states.

16. Petitioner further asserts the economic effect of the abrupt change from the origin basis to the destination basis was that petitioner reported the receipts factor on an origin basis when its sales originating in New York State (at the Potsdam mill) were high, and thereafter it was forced to switch to a destination basis when sales originating in New York State had fallen off to practically nothing (because of the Potsdam mill's closure). Petitioner maintains that the maximization of tax revenue may have played a part in the Audit Division's change of petitioner's method of calculation.

17. Finally, petitioner asserts that it had ceased production and closed its Potsdam facility as of the end of 1974, that sales thereafter were to liquidate existing inventory and were not in the regular course of petitioner's business and that petitioner was not doing business or employing capital in New York State such as to subject it to the imposition of corporation franchise tax.

CONCLUSIONS OF LAW

A. That section 209 of the Tax Law imposes a franchise tax on domestic and foreign corporations, with certain exceptions not applicable here, based on "...the privilege of exercising its franchise, or of doing business, or of employing capital, or of owning or leasing property in this state in a corporate or organized capacity,...".

B. That section 1.6 of Ruling of State Tax Commission With Respect to the Franchise Tax on Business Corporations, dated March 15, 1962, provided in pertinent part as follows:

"1.6 (formerly Art. 141). Doing Business in New York (Law Sec. 209.2).

a. The term "doing business" is used in a comprehensive sense and includes all activities which occupy the time or labor of men for profit. Irrespective of the

nature of its activities, every corporation organized for profit and carrying out any of the purposes of its organization is doing business. In determining whether a corporation is doing business, it is immaterial whether its activities actually result in a profit or a loss.

b. The mere ownership of real property within the State constitutes doing business in New York, for the purposes of Article 9-A."

C. That 20 NYCRR 1.3-2(b)(1) [filed on August 31, 1976, and effective for all taxable years beginning on or after January 1, 1976] contains language essentially identical to that contained in former 20 NYCRR 1.6(a) [above]. In addition, 20 NYCRR 1.3-2 further provides, in pertinent part at subdivisions (c) and (d) as follows:

"(c) Foreign corporation-employing capital. The term 'employing capital' is used in a comprehensive sense. Any of a large variety of uses, which may overlap other activities, may give rise to taxable status. In general, the use of assets in maintaining or aiding the corporate enterprise or activity in New York State will make the corporation subject to tax. Employing capital includes such activities as:

(1) maintaining stockpiles of raw materials or inventories; or

(2) owning materials and equipment assembled for construction.

(d) Foreign corporation-owning or leasing property. The owning or leasing of real or personal property within New York State constitutes an activity which subjects a foreign corporation to tax. Property owned by or held for the taxpayer in New York State, whether or not used in the taxpayer's business, is sufficient to make the corporation subject to tax. Property held, stored, or warehoused in New York State creates taxable status. Property held as a nominee for the benefit of others creates taxable status..."

D. That petitioner was clearly subject to franchise tax by New York State during each of the years at issue. Petitioner owned real property in New York, namely the Potsdam mill, during each of the years 1975 and 1976. Petitioner also maintained inventory and other assets in New York. Some of the inventory

was sold in 1975 and some was scrapped. Some of the other assets were ultimately transferred out to another Nekoosa facility, with the remaining assets being stored at the Potsdam mill for eventual sale with that facility. Petitioner asserts that a November 3, 1966 Opinion of Counsel (of the Department of Taxation and Finance), concluding that a dissolved corporation liquidating its assets is not subject to franchise tax liability, is controlling in this matter. We note that such Opinions of Counsel, while meriting some weight, are not binding on the State Tax Commission [see 20 NYCRR 900.3(c)]. Furthermore, petitioner herein was not a dissolved corporation.

E. That subdivision 3 of section 210 of the Tax Law (as amended by L. 1968, Ch. 557), in effect for the years at issue, provided in relevant part as follows:

"The portion of the entire net income of a taxpayer to be allocated within the state shall be determined as follows:

(a) multiply its business income by a business allocation percentage to be determined by

* * *

(2) ascertaining the percentage which the receipts of the taxpayer, computed on the cash or accrual basis according to the method of accounting used in the computation of its entire net income, arising during such period from

(A) sales of its tangible personal property where shipments are made to points within this state,

* * * "

Such section may be referred to as the destination method of computing receipts. Prior to its amendment in 1968, subdivision 3 of section 210 provided a more complicated method of calculating the receipts factor of a taxpayer's business allocation percentage, generally referred to as the origin method of computing receipts.

F. That petitioner computed the receipts factor of its business allocation percentage, both before and after the 1968 change in the law and during each of the years at issue, on the origin basis, notwithstanding the change in the law requiring computation under the destination basis. Petitioner asserts this method was used because petitioner was unaware of the change in the law, and further notes that the Commission's regulations reflected the origin method of computation (see section 4.15 of Ruling of State Tax Commission With Respect to the Franchise Tax on Business Corporations, dated March 15, 1962) as in effect until such regulations were amended in 1976 to reflect the destination method as the proper means of calculation (see 20 NYCRR 4-4.1).

G. That regulations of the State Tax Commission do not supercede or hold the force and effect of law, but rather are intended to offer clarification of the law. Here, the law itself changed the basic method of calculating the receipts factor and did so seven years before the first of the years at issue. Petitioner's argument that it was unaware of the law change does not merit sustaining petitioner's use of the origin method rather than the destination method of calculation.

H. That petitioner's assertion that the Commission should exercise its discretion under subdivision 8 of section 210 of the Tax Law and adjust the calculation of its business receipts to reflect the methods contained in the regulations in effect during the years at issue (i.e. origin basis for 1975; destination basis for 1976) is not accepted. Although petitioner's Potsdam mill was not engaged in production during 1975 or 1976, there were some sales of its inventory and stock during 1975. Furthermore, there has been no showing by petitioner that computation of its receipts factor under the destination basis as required under the law fails to accurately reflect the amount of

(total) business done by petitioner in New York. Accordingly, recomputation based on the destination method, per the statute (Tax Law §210.3), for both of the years at issue is sustained.

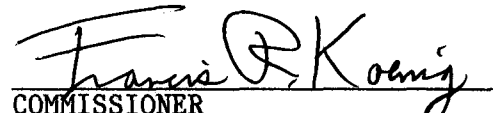
I. That the petition of Nekoosa Papers, Inc. is hereby denied and the notices of deficiency dated January 10, 1980, together with such interest as is lawfully owing, are sustained.

DATED: Albany, New York

STATE TAX COMMISSION

MAR 14 1984


PRESIDENT


COMMISSIONER


COMMISSIONER